

T.K. Productions, Inc. and Sean O. Walby. Case 28–CA–15522

September 18, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

On February 22, 2000, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order.

¹ The Respondent filed a request for leave to file a brief in response to the General Counsel's reply brief, or, in the alternative, a motion to strike the General Counsel's reply brief. The Associate Executive Secretary denied the Respondent's request for leave to file a response brief, and the Respondent filed a special appeal of the Associate Executive Secretary's decision. The special appeal of the decision of the Associate Executive Secretary is denied because, as he stated, the Board's rules do not provide for such briefs. The motion to strike the General Counsel's reply brief is also denied. The General Counsel's reply brief is properly limited to matters raised in the Respondent's answering brief.

In addition, we deny the General Counsel's motion to strike the attachments to the Respondent's answering brief. We have not, however, considered information pertaining to the lawfulness of Local 104's hiring hall list, as that issue is not before us.

² The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that Sean O. Walby exaggerated in his testimony, and specifically when he testified that Swain recommended him to Mary Courtney, and that Courtney, in turn, recommended him to Tommy Tancharoen, we do not rely on the judge's further commentary regarding that testimony. We also do not rely on the judge's speculation that Swain informed Courtney that Walby was a member of Teamsters Local 2.

We adopt the judge's finding, based on credibility, that Brian Steagal did not tell Walby that he could not hire him because it would cause disharmony on the set. We do not rely on the judge's speculation that Walby's presence on the set would not in fact have caused disharmony among the employees.

We adopt the judge's finding that Walby's decision to travel to Phoenix to obtain chiropractic treatment and to have work done on his recreation vehicle does not demonstrate that Respondent had offered him a job, but we do not find it necessary to rely on the judge's speculation as to Walby's motivation in traveling to Phoenix.

We find merit in the General Counsel's exception to the judge's finding that, "Local 104 stood behind the qualifications of the persons

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Paul R. Irving and John T. Giannopoulos, Esqs., for the General Counsel.

Steven Drapkin, Esq., of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Phoenix, Arizona, on December 7–8, 1999. The original charge was filed November 6, 1998,¹ and amended on January 28, 1999. The complaint was issued by the Regional Director for Region 28 on January 29, 1999, and alleges that T.K. Productions (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by withdrawing an offer to hire Sean O. Walby (Walby) because he was not a member of Teamsters Local 104. Connected to that allegation are additional allegations that Respondent violated Section 8(a)(1) in several ways, including coercive interrogation about Walby's union affiliation and saying he would not be hired unless he was a member of Local 104. Respondent denies that it ever offered a job to the Charging Party and denies the 8(a)(1) allegations.

Issues

The principal issues here are twofold: The first is one of credibility on at least three fronts. Did Respondent ever offer employment to the Charging Party? If so, did it withdraw the offer? If so, is Walby more credible than Respondent's transportation captain, Brian Steagal, when Walby claims, and Steagal denies, that Steagal said that hiring a nonmember of Local 104 could create friction among the drivers and it was for that reason the offer had been withdrawn? The second issue is whether Respondent did anything illegal by admittedly hiring only from a list provided by Local 104 (which was not operating a hiring hall), particularly in circumstances where the General Counsel has not shown: (a) that Respondent was under any compulsion to hire from that list or, (b) that the list was somehow discriminatory. In addition, the General Counsel has alleged several violations of Section 8(a)(1), mostly interrogation.

The parties have filed briefs which have been carefully considered.² In addition, I have determined inadmissible the material

on [its list], assuring that they were Arizona-experienced motion picture industry drivers." The record does not support such a finding.

³ We do not rely on the judge's conclusion that even if the hiring hall list was limited to Local 104 members and was part of an exclusive hiring system, there would be no violation. *Reading Anthracite Co.*, 326 NLRB 1370 (1998); *Cuneo Eastern Press of Pennsylvania, Inc.*, 168 NLRB 523, 527–528 (1967); *Wolf Trap Foundation*, 287 NLRB 1040, 1041–1042 (1988).

In dismissing the allegation concerning an interrogation by Courtney, we rely only on the judge's discrediting of Walby's version of his interview with Courtney.

¹ All dates are 1998 unless otherwise indicated.

² The General Counsel filed a motion to strike a portion of Respondent's brief, some correspondence between Respondent's counsel and the Regional Office dealing with possible remedies. The motion is

set forth in Joint Exhibit 1, paragraph 3, and its subparagraphs, a stipulation (in which admissibility had been reserved), dealing with consolidated Cases 28-CA-15649, 28-CB-5077, and 28-CB-5112.³

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation, headquartered in Los Angeles where it is engaged in the motion picture production business, specifically a motion picture entitled, "Three Kings." During the 12-month period ending November 6, 1998, it admits that it purchased and received within California goods and material from sources outside the State valued in excess of \$50,000. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits and I find that Teamsters Local 104 is a labor organization within the meaning of Section 2(5) of the Act.

denied as the material is harmless. Respondent filed a motion to strike a portion of the General Counsel's brief relating to alleged misconduct by Local 104, which is not a party here. While I do not grant the motion, the material should not have been referenced as Local 104's conduct is not before me. Indeed, Local 104's counsel has written a letter to me complaining of the General Counsel's representations, consideration of which the General Counsel opposes. The parties are advised that the General Counsel's assertions regarding Local 104's conduct have been disregarded. I have also disregarded any factual representations which are outside the record as made at the hearing. The General Counsel's motion to correct the record is granted.

³ There are several reasons for this conclusion. First, consolidated Cases 28-CA-15649, 28-CB-5077, and 28-CB-5112 were settled, apparently informally. There is no reason to conclude from a settled case that any violation of law occurred. This is particularly so when a party, here the General Counsel, seeks to use the settled conduct as evidence that Respondent is likely to have behaved in the same manner. *Teamsters Local 70 (C & T Trucking Co.)*, 191 NLRB 11 (1971); *Tri-State Building & Construction Trades Council*, 257 NLRB 295 (1981). Second, this usage runs afoul not only of the familiar prior bad acts bar [Fed.R.Evid. 404(b)], but third, afoul of the rule prohibiting the substantive use of character evidence. See Fed.R.Evid. 404(a) which states: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except[ions not pertinent here]." In this proffer the General Counsel wishes to show by prior acts which he deems illegal, that such acts demonstrate a corporate character which tends to show that Respondent behaved similarly in the incidents set forth in the complaint. That effort is specifically barred by the rule. Finally, there is real doubt that the offer is relevant under Fed.R.Evid. 401. The incident in consolidated Cases 28-CA-15649, 28-CB-5077, and 28-CB-5112 involved a different division of the corporation, different managers and supervisors and an unrelated labor union, the International Alliance of Theatrical and Stage Employees (IATSE), not the Teamsters. It also involved different job applicants having different backgrounds. Finally, it involved actual evidence of IATSE interference in the job application process, a major factual difference from that alleged and proven here. Relevance is problematical in that circumstance. Taking the matter as a whole, I have concluded that par. 3 of the stipulation is inadmissible.

II. ALLEGED UNFAIR LABOR PRACTICES

Background; Undisputed Facts

Respondent, although not a member of the Alliance of Motion Picture and Television Producers (AMPTP), a Hollywood multiemployer collective-bargaining organization, is nonetheless bound by the AMPTP's collective-bargaining contract with Teamsters Local 399, the Transportation Drivers Union in Los Angeles (the Hollywood Teamsters). That contract, known in the industry as the "Black Book," is in evidence here. It provides that when a producer is filming in a distant location in the 11 western States it need not hire drivers from the Hollywood Teamsters roster but may hire locally so long as it pays the AMPTP contract wage rate or better. It does inferentially suggest that the drivers be hired through sister Teamsters Locals having jurisdiction where the work is being performed. See section V, paragraph 30 (p. 116) of the Black Book. The Teamsters Local in Arizona which can provide such drivers is Local 104.

Walby is a 38-year old Wyomingite who is trying to earn a living in the motion picture industry as a driver, stagehand, and service support person. His permanent residence is in Jackson, Wyoming. At the time of the incidents involved here, Walby was a member (on honorable withdrawal due to lack of work) of Teamsters Local 2 of Butte, Montana, which apparently has jurisdiction in Wyoming. In addition to being a Teamster, Walby also maintains membership in IATSE, Local 339 of Great Falls, Montana. He has been a teamster since 1996 and an IATSE member since 1997. His work in the industry precedes his union memberships by several years. It is fair to say that Walby has no Arizona experience. Most of his work was performed in Wyoming and Montana. As a result, he was simply not known in Arizona. In fact, his entire motion picture experience is quite modest.⁴

⁴ His first job was a 3-week stint as a driver in 1991 for a film shot in Jackson called "Lakota Moon." His next job was in 1993. From 1993 until 1996, he had 10 jobs with employers who were filming commercials and music videos in the Wyoming/Montana/Utah areas. This work invariably lasted only 2-3 days. Only 1 of the 10 was as a driver.

In April 1996, Walby obtained employment as a scout driver for the director of a Hollywood movie, "Starship Troopers," shot in Wyoming and South Dakota. It was this period of employment which led him to become a member of the Teamsters. That production was bound to the Hollywood Teamsters contract. He worked for about 3-1/2 months in various capacities for that production company.

This was followed by employment on several Wyoming based non-union commercials and a professional wrestling television show, none of which involved driving. As before the commercials were only of several days duration. In April 1997, he was hired by Walt Disney Co., to work as a fuel truckdriver for the film "The Horse Whisperer," a job which lasted about 4-1/2 months. This job, like "Starship Troopers," was one which was covered by the Hollywood Teamsters contract. Walby's employment was entirely in Montana.

That job was followed almost immediately by another Montana job for a Hollywood production, "The Patriot." Walby served as a driver from September through November 1997, again under the Hollywood Teamsters contract.

In 1998, he performed short-term work on two nonunion commercials and one nonunion documentary film. One of the commercials was in Phoenix, but on that job he worked for a food service vendor for 2-3

Even so, he has been bitten by the motion picture bug and has become very energetic in attempting to obtain work in the industry. He keeps abreast of films which are to be shot throughout the West and will take steps out of the ordinary to get hired.

Shortly after his 2-week "Touched by an Angel" job ended in late August, Walby learned that Respondent was about to begin hiring drivers for the Arizona portion of the film "Three Kings," which he had learned was connected to the Warner Bros. Studios and which was in preproduction at the Warner Bros. lot in Burbank, California. Portions of the film were to be shot at an Asarco copper mine near Casa Grande.⁵ Temporary offices were established there in September. Later, in early November, other portions of the film were shot near El Centro, California, and in northern Mexico.

According to Walby, sometime between September 10 and 28, he called Warner Bros. in Burbank and was eventually connected to Respondent's transportation coordinator, Tommy Tancharoen. He began by introducing himself as a teamster from Jackson Hole with industry driving experience. At that point Tancharoen was just beginning to determine what his transportation needs would be in Arizona and he politely put Walby off, telling him only to keep in touch. Indeed, Walby's was just one of many similar inquiries which Tancharoen had to field. Walby followed up his call to Tancharoen by faxing a copy of his resumé to Warner Bros. The fax was eventually routed to Tancharoen.

Despite Tancharoen's lack of encouragement, Walby decided to go to Casa Grande to try to get hired, a road trip of a little over 1000 miles. He left Jackson in his motorhome on October 18, arriving in Phoenix on October 21. He had made that decision after a three-party telephone call with two of Local 104's business agents, Bob Shetler of the Phoenix office and another from the Tucson office. During that conversation Walby asked to be placed on Local 104's driver/wrangler roster list. Both the September 30 and November 6 versions of that list are in evidence. Either during that conversation or from other information available to him, Walby had learned correctly that Respondent was going to use that list as its source for Arizona drivers. He says Local 104 did not place him on that list immediately.⁶ According to Walby, at 5:34 p.m. on October 30, Shetler advised him by a telephone page that he'd been placed on the list. The November 6 version includes his name.

The list is an extracontractual document.⁷ It is maintained by Local 104 for the convenience of any production company who

days. The documentary film work was in Wyoming and South Dakota, an 8- or 9-day driving job.

In August 1998, he obtained 2 weeks work as a driver for Caroline Productions which was shooting an episode of the television series, "Touched by an Angel" in Salt Lake City. According to Walby it was a nonunion job and he worked as a nonunion driver.

⁵ Casa Grande is located about 50 miles south-southeast of Phoenix, roughly halfway to Tucson.

⁶ Walby says that during the call the business agents agreed to put him on the list. Based on that, he says he telephoned Tancharoen in Burbank to inform of that fact. He says Tancharoen told him, "Good, because now I can call you off the list." Tancharoen says he only spoke once on the phone to Walby, describing the introductory September call, thereby denying the second call occurred.

⁷ In fact, Respondent does not have a direct collective-bargaining relationship with Local 104. As noted above, its contract is with the

wishes to hire experienced motion picture industry drivers in Arizona. Local 104 will provide that list to any Hollywood AMPTP producer who asks, but the producer is not obligated to use it. It is not, in any sense an exclusive hiring hall. Indeed, it may fairly be argued that it is not a hiring hall at all. Even so, counsel for the General Counsel asserts that the September 30 list is somehow discriminatory, contending that it was limited to Local 104 members only, and that Local 104 delayed amending the list unfairly. Yet, whatever Local 104 did or did not do with the list is not before me. That labor organization is not a respondent here. Walby's unfair labor practice charge against it, Case 28-CB-5048 was dismissed by the Regional Director. Moreover, there is no competent record evidence regarding the manner in which Local 104 compiles or maintains the list.⁸ The one thing which Respondent knew about the list was that Local 104 stood behind the qualifications of the persons on it, assuring that they were Arizona-experienced motion picture industry drivers.⁹

In the meantime, in September, Tancharoen had hired two individuals to help him with the upcoming Arizona hires. The first was Tom Whelpley, the transportation captain,¹⁰ with whom Tancharoen had frequently worked. The second, on Whelpley's recommendation, was Brian Steagall who served as acting transportation captain in Arizona during the period in question. Steagall was highly experienced and knowledgeable about Arizona industry-experienced drivers. He, like Whelpley, is a member of the Hollywood Teamsters,¹¹ but had lived in Arizona and previously been a member of Local 104.¹² In hiring Whelpley and Steagall, Tancharoen acquired a wealth of information about Arizona drivers and vendors.

Tancharoen testified about the nature of the drivers he wanted aboard: "In my work, [the] transportation department is sort of a big department. I have a lot of responsibility for a lot of department[s] and I need experienced people to make my job easier so we don't have to keep watching how everybody is doing. The better group you hire, the better you are of operating your job. So I was entertaining hiring everybody that had a good recommendation and a good experience to work for me."

When Steagall arrived in Arizona, he set about fulfilling Tancharoen's instructions. To those he added, "I needed people that were very familiar with the area, the Phoenix and Casa Grande areas." He well knew that Local 104 maintained a list of

Hollywood Teamsters. Local 104 essentially serves as the Hollywood Teamsters' field agent. See the arrangement as it is described in GC Exhs. 5, 6, and 7, correspondence between the producer and Local 104.

⁸ No witness who testified had first-hand knowledge of how Local 104 administered the list.

⁹ That Arizona can provide experienced motion picture industry employees in all crafts is beyond doubt. One of the nation's oldest non-Hollywood/New York sound stages, Old Tucson, is located about 15 miles west of Tucson. The Board has decided at least one case involving that theatrical venue. *Old Tucson Corp.*, 269 NLRB 492 (1984).

¹⁰ Whelpley was carried on the payroll as a transportation coordinator.

¹¹ Tancharoen, too, is a member of the Hollywood Teamsters.

¹² The parties have stipulated that Tancharoen and Steagall were supervisors and agents as defined by the Act. Whelpley's status under the Act is immaterial to this case as he did not participate in the transactions under scrutiny here. Even so, he was involved in hiring many of the drivers and is no doubt a supervisor as well.

drivers with appropriate experience. Indeed, Steagall knew most, if not all of the drivers on the list. In fact, the record, with one possible exception, demonstrates that Tancharoen hired no Arizona driver who had not been recommended by either Steagall or Whelpley, unless Tancharoen had personal knowledge of his own.

Tancharoen hired Steagall on October 16 or 17 and instructed him to go to Casa Grande to oversee the driving jobs required there. He arrived on October 18. He apparently had with him a copy of Local 104's September 30 driver's list.¹³ Although he could not be specific, he testified that he had only one conversation with Business Agent Shetler about the list. That, he says, was to try to get current telephone numbers of some of the people on it. The list, as written, contains no addresses or telephone numbers for the persons on it. (Steagall maintains his own address book which had most of that information, so was not much handicapped by the list's omissions.) He says Shetler told him he would get the missing information but never did. Walby was not discussed during this conversation.

Several Arizona drivers, Tim Edwards, Danny Edwards, Kip Wolverton, and Fred Steagall (Brian's father),¹⁴ had been hired before Steagall arrived. These joined about 10 Hollywood Teamsters who had previously been hired in Los Angeles. After Brian Steagall arrived in Casa Grande he recommended the hire of Robert Trout and Rick Currens whose first day was October 25. Fred Liberman came to work on October 26, presumably on Whelpley's advice. Monty Lira followed on October 27, based on Steagall's endorsement.

A review of General Counsel's Exhibit 8, the employment run, reveals that there were about 14 drivers on the production on October 22, the first day Walby arrived at the site outside Casa Grande. Almost immediately that number grew by 4, those named above, for a total of 18. These drivers were engaged in a variety of duties. Some were involved in building a temporary road, some carried passengers, others were scouts, while yet others hauled trailers of various types, no doubt performing the necessary loading/unloading work.

Walby at Casa Grande

Upon his arrival in Phoenix on October 21, Walby went to Local 104's office and spoke to Business Agent Shetler, ostensibly to thank Shetler for putting him on the driver's list. He says Shetler told him, however, that there was some delay and they were still working on it.

The following day, Walby drove his RV to the Casa Grande location. There, he hung around with the security personnel until someone pointed Steagall out to him. He testified on direct regarding how he met Steagall and what happened:

A. (WITNESS WALBY): He [was] talking with some of the other individuals and I then introduced myself to him.

Q. (MR. GIANNOPOULOS): And what did you tell Mr. Steagall?

¹³ The September 30 version had been faxed to Tancharoen on October 13.

¹⁴ Walby, somehow, came to believe that Fred Steagall was the same person as Red Steagall, the country and western recording artist.

A. I told him I was Sean Walby and I had been talking to Tom Tancharoen, that I was a teamster with production experience and that I was in the process of getting on the motion picture driver's list.

Q. Did you say anything else to him? Did you tell him—I'm sorry, did you say anything else to him?

A. I said—yeah, we got talking about various individuals that we both had worked for in the industry, different names of different people, different shows, that sort of thing and he said that Mr. Tancharoen would be coming in the following Wednesday, Wednesday, October 28th.

Q. Did Mr. Steagall say anything else to you regarding your conversation then?

A. No, like I—again, to recant [sic], you know, I told him I was in the process of getting on the list.

On cross, his testimony expanded:

Q. BY MR. DRAPKIN: Okay, so when you first met Mr. Steagall did you tell him what you were most interested in doing on the show was construction work?

A. Oh, absolutely not, sir. The extent of our conversation is in both those text[s]¹⁵ that you have and one does not dispute the other.

Q. Okay, so if Mr. Steagall's recollection is that you told him you were most interested in getting a construction job, would you dispute that?

A. Oh, most definitely, sir.

Q. Did you tell him in that meeting that you were a Teamster from Montana?

A. Yeah, I'm probably sure I told him that I was a Teamster from Local 2.

Q. You volunteered that fact?

A. Yeah, I sure did.

Q. Because you thought being a union member would help you get work, right?

A. That's what I am, sir. Right, that's what I am.

Q. So you were advertising that you were a union member. That's a correct characterization, right?

A. I was informing him that I was in the union, yes, sir.

Q. Okay, and he didn't ask you if you were or weren't in the union.

A. Sir, on that particular I cannot remember.

Q. You can't remember.

A. That's right.

Q. Okay. In terms of his interest in you, he was extremely noncommittal, correct?

A. Well, no, I asked him—I asked him during a conversation, "Are you going to be hiring some drivers", and he gave—Brian, if you know about him, he gave a big nod with his head, "Lots of drivers." He propped himself up, big show. Big show, "We're going to need lots and lots of drivers." That's what he said to me and he told me—I told him that I had talked—had been talking with Tommy Tancharoen about going to work on the show and he told

¹⁵ Referring to the NLRB affidavit and the supplemental statement which he wrote later.

me that Mr. Tancharoen was coming in the following Wednesday, which would have been a Wednesday the 28th.

Q. Is this the meeting where you said he said that he was going to recommend you to Mr. Tancharoen?

A. Oh, certainly not, sir. This was a brief encounter, a very brief encounter.

Walby continued to hang around the site for several days and on October 26, persuaded production coordinator Lisa Swain to hire him for a 1-day job unloading a van, fixing a door jamb, and placing some office furniture. This job was not considered to be a Teamsters job (nor, apparently, an IATSE job). He says Swain liked his work and told him she would recommend him to both Mary Courtney, a production supervisor, and to Tancharoen. He says that Swain told him the movie was a "union job"¹⁶ and asked if he was a member of any union. He told her, he says, that he was a member of both Teamsters Local 2 and IATSE. Neither Swain nor Courtney had any responsibilities or authority with respect to the transportation department. They worked in an entirely different division, production. Walby, however, would have taken a job with any of Respondent's departments, if offered.

Later that day, according to Walby, he had another conversation with Steagall. He testified:

Q. (BY MR. GIANNOPOULOS): And did you have any other discussions with Mr. Steagall about working for TK Productions that day?

A. Yeah, we talked about the motion picture industry, the ins and outs and different things and he understood that this is what I did for a living. That I'd worked on productions before, that I was a professional and that when Tom Tancharoen came in he would understand this, that I need to talk to Tom Tancharoen when he arrived in Casa Grande and that *he would recommend me for hire to Mr. Tancharoen.* [Emphasis added.]

On cross, Walby said that Steagall had told him sometime between October 27 and 28 that he would recommend him for hire to Tancharoen. This claim that Steagall told Walby he would recommend him to Tancharoen is omitted from both his NLRB affidavit as well as a supplemental statement he put together sometime later. Steagall denies that he ever told Walby that he would recommend him to Tancharoen and further says he never did so. Steagall only went so far as to observe to Tancharoen at one point that Walby seemed like a nice guy who was looking for work, hardly a recommendation for hire.

It is difficult to credit Walby here. At that time Walby had never worked for the transportation department and only moments before had completed a 1-day laboring job for Swain's department. Steagall didn't have any exposure to Walby's work at that point, and even if Swain told him she liked Walby, it would not have impelled Steagall to tell Walby that he would

recommend him to anybody, much less Tancharoen. He didn't have sufficient knowledge to do so.

Having impressed Swain, and continuing his persistence, Walby obtained an interview with Courtney on October 28. He says he went to see her because, "Because Lisa Swain *and her entire production staff* had recommended me to go see her." (Emphasis added.) I find his testimony here to be an example of what is found throughout Walby's testimony. He frequently embellishes for his own advantage. It is not sufficient for him to say that Swain suggested he see Courtney about employment; he has to insist that it was the unanimous opinion of her entire staff. Similarly, when being asked about his conversation with Courtney, he gave the following answer (which was unresponsive to the question but which continues to make the point): "She said that she had high praise for me about my abilities from Lisa Swain and *the entire production staff* and she was going over to recommend me, personally recommend me to Tom Tancharoen." (Emphasis added.) Here he wishes to leave the impression that the staff was large and that it unanimously believed his 1-day laboring job had been done so well that Courtney would recommend him to Tancharoen in the transportation department. Rather than helping his cause, such testimony only triggers skepticism. Walby's approach to factual presentation suggests that objectivity is not available from him.

In any event, on October 28 Walby met with Courtney. As he understood it, Swain had previously paved the way for him. Swain, of course, knew he was a member of Teamsters Local 2 and the IATSE. Given Walby's openness about that fact, it is entirely probable that Swain had passed that information on to Courtney. Apparently wanting to hear it for herself, according to Walby, she asked him if he was a member of any union. From that question, Walby concluded that Courtney did not know of his union memberships prior to the interview. He answered, again reciting both union memberships. Courtney also reviewed his resumé. He says she also asked if he was on "any of the local lists." He replied that he had received inconsistent information about Local 104's list and that he was on the IATSE studio mechanics list.

As a result of that interview she offered Walby a job as a production assistant. That job would have included driving the movie's star, George Clooney, whenever he was on the set as well as performing other duties for Clooney. Walby thought it over. He became concerned about two things. First, because Clooney was not on the set full time, he considered it to be only a part-time job. Second, he wanted to drive as a teamster and this job was not within the Teamsters' jurisdiction. He told Courtney that he would take the job as an assistant but would not drive unless it was as a Teamster. He says she told him that she would take the matter up with Tancharoen who had just come to the site that day. He says she left the room for awhile and upon her return advised that such an arrangement could not be made.

Tancharoen seems to confirm that she asked him something of that nature, but he declined due to line item budget considerations. Tancharoen characterized the job described to him as the personal assistant to Mr. Clooney, a job which his transportation budget did not cover. Either way, Tancharoen had no job openings at that time. He says Courtney simply asked if he could use Walby, and he replied he could not. ("I don't know. I don't

¹⁶ The General Counsel finds Swain's description to be evidence of Respondent's discriminatory attitude. I cannot agree. As Respondent was bound by at least two collective-bargaining contracts, Hollywood Teamsters and IATSE, if not more, I find such a remark to simply be a factually accurate description of the nature of the working conditions extant there.

know, he's on the list but I don't have anything to offer him right now.")

Walby did not accept the job. The reasons he gave were the same concerns he expressed earlier; it was parttime and it was nonunion.

Walby did not actually meet Tancharoen until a day or two later. He, Steagall and Tancharoen even differ on the number of their meetings. Walby says he had discussions with Tancharoen on Friday, October 30, and Saturday, October 31, and Wednesday, November 4. Tancharoen agrees they spoke on October 30, but says they didn't talk again until November 4, a date they both agree upon. Walby and Tancharoen also have differing recollections about their encounter. Walby testified about their first talk on October 30:

Q. (BY MR. GIANNOPOULOS):

Did Mr. Tancharoen introduce himself to you?

A. No, Brian Steagall introduced me to Mr. Tancharoen.

Q. And what did you say to Mr. Tancharoen?

A. Well, I introduced myself and he said that, "Mary has raved to me about you". And I said, "Sir, would you be needing some drivers on the show"?

Q. And did he reply to you?

A. Yes.

Q. Yes, he did reply? What was his response?

A. I said would you be able to—I said—more specifically, I said to him, would you be able to use me on the show", and he said, "Yes."

Q. Okay, did he—did you ask him when?

A. Yes, and the next thing that I said was, "When would you be able to use me", and he said, "Next week," which was the week of November 1st through the 7th.

Q. Did you say anything else to him?

A. Yes, I said I was having major problems getting on the Arizona movie list and he said that he would talk to Bob Shetler on my behalf.

Q. How did you leave your conversation with Mr. Tancharoen that day, Mr. Walby?

A. That I would follow up with him on Tuesday, November 3rd.

Walby's testimony on direct raises some questions. Why would Tancharoen say Courtney had "raved" about Walby? She had offered him a job, but he had turned it down. For Tancharoen to quote Courtney as having described Walby in such terms seems beyond likelihood. Second, why would Tancharoen offer to help Walby get on Local 104's list, i.e., "talk to Bob Shetler" on his behalf? He didn't know Walby or his work and he was relying on Local 104's superior knowledge about those on the list to assist him with his hiring.

On redirect, Walby added:

Q. (By Mr. GIANNOPOULOS) When did you believe you were offered a job in the transportation department?

A. When I first talked to Mr. Tancharoen Friday afternoon, October 30th.

This latter testimony raises the question: If Tancharoen had offered him a job on October 30, why would Tancharoen simultaneously offer to help him with Local 104? It would have been

entirely unnecessary. And, although Walby's description of what transpired on October 30 did not include it, when he began testifying about what occurred the following day, October 31, he said the purpose of that conversation was to follow up on Tancharoen's offer of El Centro, California work to inquire when it might begin:

(WITNESS WALBY) I asked Mr. Tancharoen if he knew when he wanted to send me to California, when I might be going to California because I wanted to take my RV there to California and then I would live in that RV.

JUDGE KENNEDY: Just what he said, what you said, not the reasons behind it.

THE WITNESS: Okay. So he said, gave a probable date or a maybe date of November 11th.

Walby never actually described what work Tancharoen's "offer" in California would entail. He also says that it was during the October 31 conversation with Tancharoen that he mentioned moving his RV to El Centro. (Both Tancharoen and Steagall say the conversation regarding moving the motorhome occurred on November 4.)

Tancharoen testified regarding their October 30 discussion:

(WITNESS TANCHAROEN): . . . We arrived to the office and I believe Mr. Walby, he's walked over to me and introduced himself. He said he was—wanted to introduce himself face to face because we never seen each other before [. . .] prior to conversation on the phone.

And he said—he asked me if would I going to be needing him any time soon. I believe I said, "As of right now, I don't believe I have anything yet but just keep checking with me". And I think I asked, "Are you on the list", and he said he wasn't sure because he was tried to call the right person at the union and keep missing the person.

Q. (BY MR. DRAPKIN) Did he tell you that he thought he was getting on the list or something to that effect?

A. He said he was trying to get on the list.

Q. Okay. And do you recall anything else about your first conversation with him?

A. No, I was quite busy. The conversation last, two, three, four, five minutes, I'm not sure. We just briefly—I just wanted—there was a lot of people in the parking lot and just needed to get back in the office, do other business and that was the length of our conversation.

Q. Do you have any recollection—do you have a recollection of a subsequent meeting with him; is that correct? [. . .] A second and last meeting with him, you testified that you met with him twice.

A. Yeah, that's prior to for me leaving for El Centro, in early November.

Q. Okay, if I told you that he stated that he had a meeting with you and Brian Steagall on November 4th, would that—do you have any reason to dispute that date?

A. No, no.

Q. Is the meeting you have in mind the meeting in which Mr. Steagall was present?

A. Yes.

Q. And now, without asking you about the second meeting, did you have any communications from Mr. Walby between the first meeting and the second meeting?

A. I can't recall.

Q. Is it possible?

A. Could possible, but I can't recall.

Q. Did you ever offer him a job between the first meeting and the second meeting?

A. No, sir.

Q. Did you ever suggest that you had a job for him between the first meeting and the second meeting?

A. No.

Walby testified, above (a) that he had been offered a job on October 30 and (b) he and Tancharoen had left it for him to check back on November 3. Yet he went on to describe an October 31 encounter, one which Tancharoen did not recall, but whose testimony impressed me as denying it ever took place. Walby, as noted above, says he spoke to Tancharoen that day to inquire about a start date, learning that it might be November 11 in El Centro.

Walby says as he left he gave Tancharoen his business card, on which was written his Arizona pager number. Tancharoen pinned the business card on an office bulletin board. (Tancharoen testified that did not occur until November 4.) Walby says he did not tell Tancharoen that he'd learned the night before that he'd been placed on Local 104's driver-wrangler list, even though that had been a subject of their discussion the day before. (In his affidavit, he says he did mention that fact to Tancharoen.) In addition, he says he spoke to Courtney to tell her he'd been hired.

He says, upon learning of that proposed start date he left Casa Grande for Phoenix to get his motorhome overhauled in preparation for the trip to El Centro (about 235 miles west of Casa Grande) and to undergo some chiropractic/acupuncture treatment for a sore back 2 days later, both in preparation for the upcoming job.

The General Counsel sees these preparations as inferential support for Walby's credibility. Why, they ask, would Walby have done those things if he hadn't been offered a job? Another, and more reasonable, answer to that question easily presents itself. If Walby was suffering from back pain, it seems likely that he would seek immediate treatment whether or not he had a job in the offing. In fact, if he was looking at a November 11 start date as he says, and the acupuncture was to relieve the pain so he could start work pain free, he wouldn't have needed chiropractic attention until closer to that date. Instead he sought it almost immediately after October 31. That suggests his pain was sufficiently unbearable as to require immediate attention, job or no job. Similarly, if his RV was having mechanical problems, requiring an "overhaul" as Walby said, it too would require near-immediate attention. After all, he was over 1000 miles away from his Wyoming home and needed to assure himself of the vehicle's reliability for the trip back. Depending on the problem, it might even have needed attention for the Phoenix-Casa Grande commute he was making. Accordingly, I reject the General Counsel's argument that these preparations support Walby's

claim that Tancharoen offered him a job in El Centro. Those were problems which needed attention no matter what.

During his stay in Phoenix, Walby spoke with Shetler who confirmed the pager message of October 30 that he had been placed on Local 104's driver-wrangler list. The written version of the modified list was not created until November 6 and did not find its way to Respondent until shortly after that.

Walby says he returned to the Casa Grande office on the evening of November 3. According to Steagall, he and Walby spoke that day about problems Walby was having getting on Local 104's list. Walby knew the Union had told him he was on the list, per the pager message and Shetler's confirmation. Still, he remained concerned because no copy of that list had actually been sent to Respondent. Steagall testified:

Q. BY MR. DRAPKIN: Was there any discussion in that meeting about the significance of the list?

A. Very briefly, I mean, the significance that it didn't matter to me if he was on the list or not. I mean—

Q. Did you explain why you didn't think it was important to you whether he was on the list or not?

A. My belief was because it was a right to work state, you didn't have to be on the list and that's the way I always approached it.

Q. And you discussed that with him in that meeting?

A. Yeah, I think so.

Q. Okay. Do you recall making comments to him about Arizona being a right to work state?

A. Yes, I did.

Steagall says Walby then explained that he had been paying hiring hall fees to Local 104 implying they should have put him on the list.¹⁷

Walby at first denied that Steagall had ever spoken to him about Arizona's status as a right-to-work State. ("Oh, absolutely and unequivocally no. I don't believe him ever talking to me about a right to work state." "[Steagall] never made a comment as far as I know about Arizona being a right to work state.") When confronted with his affidavit he made a concession, but with a date limitation ("Oh, absolutely, I never—absolutely and unequivocally never heard about—he never talked to me previous of November 4th about a right to work state, about union dues, about this card, absolutely and unequivocally.") In fact he seems to deny that he had any discussion whatsoever with Steagall on November 3.

Walby knew that in a right-to-work State an employee did not need to be a union member to be hired or to work under a union contract. He came from Wyoming where the same concepts apply. Nonetheless, he believed it was important to stay on the right side of the Union by either transferring his membership or lodging his card with the Local ("dobyng in" or paying whatever fees they sought). He became somewhat obsessed with the fact that he had paid money to Local 104 (explained to me as a hiring

¹⁷ Steagall: "I know that [Walby] kept telling me he was—he did everything he had to do to be on the list, that he had paid his money and he should be on there and I know he was telling me that he was talking with them quite a bit in regard to how come I didn't have a list with his name on it."

hall fee)¹⁸ and seemed to be getting nothing for it. He seems to have talked about it to anyone who would listen.

In any event, between 6:30 and 7:30 a.m. the next day, November 4, Walby was again at Tancharoen's Casa Grande office. There he spoke with both Steagall and Tancharoen. The versions of what was said are at wide variance.

Walby describes how it began: "[I]t was early in the morning and I didn't want to bother him. I stood at the doorway and Mr. Tancharoen looked up, nodded at me, smiled and said, 'We're getting close.'" Tancharoen denies using the phrase in such a context, but Walby took it to mean Tancharoen was referencing the job he says he believed he had been offered. Walby's further direct testimony:

Q. (BY MR. GIANNPOULOS) Did anything happen after Mr. Tancharoen made those comments?

A. Yes, they talked about not being—still not being on the union list.

Q. Who is "they"?

A. I'm a little bit—I just have to take a deep breath here. Okay, go ahead with your question.

Q. I'm sorry, you said "they talked about not being on the union list". Who is "they"?

A. He said—this was November 4th and he said—he looked up to Brian Steagall as I was standing in the doorway and there was a planter between the two desks and he started discussing with Brian Steagall on when I would be brought on. And they agreed that it would be November 7th.

Q. And did they—were they speaking to you?

A. They were speaking—

Q. I'm a little confused, Mr. Walby. Who is speaking to you?

A. Mr. Tancharoen.

Q. Is speaking to you or to Mr. Steagall?

A. Yes, to Mr. Steagall at first and then he agreed with Mr. Steagall and told me that I would be brought on the show on November 7th, Saturday, November 7th.

Q. Did Mr. Tancharoen or—did Mr. Tancharoen tell you what your duties were to be?

A. Yes. He told me that I would be taking a five ton truck loaded with office equipment and so forth, from the production office to the headquarters in El Centro, California.

Q. And who—who told you that, I'm sorry?

A. Mr. Tancharoen.

Q. Did you say anything in response to that?

A. Yeah, I said, "I'm still having trouble getting on the union list", and he volunteered for the second time to talk to Bob Shetler from which Steagall then came into the—then made a statement that, "All you really need to"—I'm starting to stutter a little bit here. All you needed to work on a movie in Arizona, on a union show in Arizona was a copy of your union dues and he went to—he pulled out of his wallet a little receipt similar to this one that was brown and white and said, "This is all you needed to have to work on a union show in Arizona was"—

Q. Did you reply to that comment?

A. I did.

Q. What did you say?

A. I said, "I have one of these in my RV. I've been paid since October 1st, I paid up three months in advance and—"

Q. Did you tell him to who you had paid this money?

A. Yeah, I had paid—I had paid it to the union and they were hiring hall dues as I understood them to be.

JUDGE KENNEDY: Well, let me—to the union you mean to Local 104?

THE WITNESS: Yes, sir.

Q. BY MR. GIANNPOULOS: And did Mr.—did either of them react to your comment or did they say anything in response to your comment?

A. Yes. I continued with Steagall and I said, "As you know these are hiring hall dues, since I am down here on withdrawn from Local 2, Butte, Montana." And Tancharoen got very apprehensive and he flinched and he looked up at me and said, "You mean you are not a member of Local 104".

Q. And did you reply to his comment, Mr. Walby?

A. I did. I went back and re-explained what I had just explained to Mr. Steagall, I had just gone over with Mr. Steagall, that I was a teamster from Local 2, Butte, Montana on the Arizona movie list and I had paid my hiring hall dues and the first day of the show I would either transfer in or dobie in.

Q. Did they say anything in response to your comments?

A. Yeah, yeah. Mr. Tancharoen, like I say, he got very apprehensive and he said to me, "You mean you're not on the 104—you're not part of the 104 local." And I said, "No, I'm not."

On cross, Walby repeated the phrase several times: "[Tancharoen] was flinching and hedging and very unsettled when I told him I was not 104. I believe I'd lost the job because I was not in the 104, absolutely." "I saw the way Mr. Tancharoen acted as a man and say (sic) [saw] him flinch, be very unsettled, and I talked to him about calling the international with all the problems I had down here and he was unsettled very more, just instincts. We have a third sense or a sixth sense, sir, and my sixth sense was activated." "I think I word (sic) [wrote] probably in both text[s] that he flinched, in other words, like panic in his eyes and I caught that. That's what I felt."

On further cross Walby added:

Q. (BY MR. DRAPKIN) As of November 4th, you thought you were on the list and the only question is whether or not these guys [Tancharoen and Steagall] had the list, correct?

A. Well, no, Steagall told me, he said, "We need that list."

Q. When did he tell you that?

A. During the meeting of November 4th.

Q. You're saying during the meeting of November 4th Steagall said, "We need the list?"

A. "We need the list." It's in there, look.

Q. Did you tell him at that point, "Just call Shetler and he'll confirm it?"

¹⁸ Hiring hall fees for nonmembers are generally lawful. *J. J. Haggerty, Inc.*, 153 NLRB 1375 (1965).

A. No, he told me to tell Shetler, which was crazy, out of line. I'm just a humble laborer and I'm going to tell the BA to send a list to these people in California who I hardly know? Totally out of line. I just acknowledged, nodded my head.

Q. You're saying that in the meeting on November 6th (sic) [November 4th] Steagall said, "We need the list."

A. "We need the list," he still hadn't had an updated list.

Steagall testified that prior to the November 4 discussion, most of his conversations with Walby did center around Local 104's movie list. Although Steagall was using the list to hire employees, he said that he knew he wasn't obligated to do so. He also says he knew he possessed a list which might be out of date. On direct he said:

Q. BY MR. DRAPKIN: So was there some discussion [with Walby] that you didn't have a physical document that had his name on it.

A. Exactly right, I did not have one, yes.

Q. Okay, but did you indicate to him that that was relevant to you or irrelevant to you?

A. Yeah, I did. I mean, if—I mean, I certainly could have picked up the phone and made the call to find out but it did not—at that point it didn't matter.

Q. Why?

A. Because I believed you didn't have to be on the list to be hired on the show.

Q. And did you have any interest at that point in time in hiring him?

A. No, I didn't.

Thus, even before the November 4 meeting, the witnesses are in opposition. Walby claims a job had been offered to him on October 30. Steagall says he had no interest in hiring him. Walby says that during the November 4 meeting (and afterward) Steagall told him they needed the list before he could be brought aboard. Steagall says that the list didn't matter to him as it was not a bar to the hiring process, but even if it did, he knew the list in his possession was a month old and he could check on any updates simply by calling Local 104 to learn about them.

With respect to the November 4 meeting itself, both Steagall and Tancharoen deny that Tancharoen ever told Walby that "we are close" with respect to hiring him. Nor does Steagall recall Tancharoen flinching when he learned (not for the first time) that Walby wasn't connected to Local 104.¹⁹

Both Steagall and Tancharoen agree with Walby that jobs were discussed with Walby during that three-way meeting. One was a possible drop load which involved driving an equipment truck from Casa Grande to El Centro. The problem with that job was that Walby would not have transportation back to Casa Grande. Walby proposed taking his motorhome to El Centro, leaving it, and finding his own back to pick up the drop-load. Tancharoen discouraged that because there was no other job

awaiting Walby in El Centro and he didn't like the idea of going back and forth in the manner suggested.²⁰

Tancharoen's recollection is slightly different as well. His testimony about the meeting:

Q. (BY MR. DRAPKIN): About what time of the day did that meeting occur?

A. It's early in the morning. I believe Brian Steagall already at the office. He's inside the transportation office. I drove into the parking lot and Mr. Walby was by the door to come into the transportation office. I say hello to him and he say hello to me back and he was asking if there was going to be anything for him yet and I said, "As of right now I believe I don't have anything". And then I walked into the transportation office and he followed me and stood by the door of the transportation office.

And he said—and I think, I believe I said we might have some construction going on in El Centro, but I don't know the exact date it's going to happen. It maybe and maybe not, it depended on the director decision because the particular set they were trying to build in El Centro, the producer wanted the director to make a change and have it—bring it to Arizona.

Q. Okay, so you told Mr. Walby that there might be some construction work coming up in the future but it was uncertain.

A. Uncertain.

Q. What did he say?

A. He said, well—he said, "I have a trailer", a camping trailer that he's staying in. He said, "I can start moving that to El Centro" and waiting for me there or waiting for something to happen. I said, "Well, don't do anything yet. I don't want you to go through all the expense to take your trailer there, rent the space to park it, because it may happen, it may not happen."

They also discussed the drop load job. Tancharoen said:

A. I believe I mentioned that we were going to have a truck going to El Centro with the production office equipment, furniture and fax machine and few odds and ends that need to be set up in the production office in El Centro.

Q. And what did you say to him?

A. I believe I says, it would probably be a day just to do the drop load, a day or two at the most.

Q. Okay. Did you offer him that job?

A. I said, "If you're interested, it might be that but you have to do a drop load and get transportation back to Arizona."

Q. That's what you told him.

A. That's what I did tell him.

¹⁹ Walby also described recounting for Tancharoen some conversations he had had with a Hollywood teamster and some International Teamsters officials. Neither Steagall nor Tancharoen remembered that as having occurred either.

²⁰ Steagall: "Tommy and I and Sean, I think, discussed there might be a drop load of office stuff out to El Centro but that wasn't, you know, it wasn't a for sure job but it could happen. We discussed—I think Sean at that point wanted to move his—when he heard that from Tommy he was going to take his motor home—his RV out to El Centro and park it there and I think I remember Tommy Tancharoen discouraging that because he wasn't for sure if in fact he was going to be hired on the show."

Q. But at that time you said it was—did you tell him you were offering him that or that that was a possibility?

A. It was a possibility. It wasn't a major—I mean, like an offer.

Q. And how did he respond to that?

A. He said that was fine.

Tancharoen says it was at that point that Walby handed him his business card with his pager number on it, saying he was on Local 104's list now. He denies anything else occurred in the meeting. Tancharoen denies there was any discussion of Walby's lack of membership in Local 104:

Q. (By Mr. DRAPKIN): Mr. Walby testified that you reacted in surprise at some point when you said something to the effect, "You mean you're not a member of Local 104." Do you recall that discussion?

A. I don't recall that discussion.

Q. Do you believe that discussion did or didn't take place?

A. I don't believe it took place. I mean if it took place why would I be surprised because he introduced himself at the first time when he make that telephone to me that he was a Teamster from Jackson Hole, Wyoming.

Q. So as of the time of the meeting of November 4th, did you have any understanding in your mind as to whether Mr. Walby was or wasn't a member of Local 104?

A. Could you repeat that question again?

Q. As of the meeting of November 4th, the meeting we're talking about, did you have an understanding that Mr. Walby was or wasn't a member of Local 104?

A. Well, when he handed me his business card and told me that he's on the list of 104, I mean, that's—

Q. But in terms of being a member in terms of, you know, who his card was with, did you have any understanding as to whether he was or wasn't a member of Local 104?

A. I don't—I don't think I really care whether he's on[e] or not. Basically when (sic) [what] he told me [is] he's on the list and that was basically was my understanding.

Tancharoen also denies there was any discussion about Arizona being a right-to-work State or union dues or anything of that nature.

Walby says the meeting concluded when he "agreed" to follow up on November 6. He said he would do that even though, according to his testimony on redirect, he believed he had already lost the job. He believed it was lost even though he knew he was on Local 104's hiring list and Steagall had told him to tell Shetler that Respondent needed an updated list.

This testimony is strange. First, there is the question of who Walby was agreeing with when he says he "agreed" to return on November 6. He believed, he says, that he had already lost the job. If someone told him to check back on November 6, why would he believe the job had been lost? Moreover, who actually told him to return that day? Neither Tancharoen nor Steagall say that they did so. Was Walby "agreeing" only with himself? And, if one of those two did tell him to check back, why were they doing that? To present a copy of the list with his name on it? If the drop load was to take place on November 7, the date Walby testified was given him on November 4, why would he

have to check back on November 6? They knew how to get him by pager if the pickup' time of day was an issue. Did they suggest to him on November 4 that things were still unsettled and for that reason he "agreed" that he would check back on November 6? It seems likely to me that he returned on November 6 because he knew the offer remained uncertain. If that is true, what can be made of Walby's testimony about the purported offer of October 30? Can it be trusted? I do not think so.

The November 6 meeting occurred between 6:30 and 7:30 a.m. According to Walby, the only person in the Casa Grande office was Steagall. Walby says he asked Steagall if things were ready to go the next day. He says Steagall told him he had some bad news, his hiring situation had changed. Walby's testimony: "He [Steagall] said that he had had a long chat with Tommy Tancharoen after me being there at the office on November 4th and that he thought that hiring me would cause disharmony on the set and so forth and he helped persuade Tommy Tancharoen not to hire me for the show." On cross-examination, Walby added that Steagall said the disharmony would be caused because he wasn't a member of Local 104.

Then, according to Walby, Steagall shifted gears: "[W]hat he [Steagall] told me was that they didn't think they'd need as many drivers as they first thought. Then he made the statement that, then again, they may need a lot of drivers because the production and preproduction had been quite chaotic and if this chaos was going to continue, perhaps it would be a runaway and they would need lots of drivers."

About then, Steagall's telephone rang and stopped their conversation. The caller was Tancharoen and, according to Walby, he walked outside to allow them privacy. A few minutes later Steagall joined him on the lot and told him that Tancharoen had instructed him to tell Walby that if he could find another job on the show to take it.

Walby responded that he had other options and intended to file unfair labor practices with the NLRB. (He had visited the Board's Regional Office in Phoenix the day before and had learned about his rights.) He says Steagall told him that he didn't blame Walby if he filed charges, that there had been many problems with the unions in Arizona. Later that afternoon, Walby filed against both Respondent and Local 104. As noted previously, the charge against Local 104 was dismissed by the Regional Director.

Steagall recalls the November 6 meeting somewhat differently. He was on the phone to Tancharoen at the time Walby entered the office. He says: "Sean came to the office and it just so happened Tommy Tancharoen was on the phone and Sean was again wondering why his name wasn't on the list and I asked Tommy, I said, 'Look, if we're going—is there going to be any work for Sean on this show.'" And at that point Tommy told me it didn't look like it." As a result he told Walby that they weren't going to be hiring him. A short time later they met outside and spoke again. He says they spoke of problems that movies had had with the local union(s), specifically a local union in Kansas.²¹ At that

²¹ Steagall: "We had a discussion about different problems that the local had. I think I told him about a show I did out in Kansas or somewhere that you know, we'd had problems with, you know, people coming in from other locals and certainly not pertaining to this show."

point Walby said he had another card to play and was going to play it.

Steagall specifically denies saying anything to Walby during that meeting regarding Walby's presence on the job as being likely to cause disharmony.

Tancharoen's testimony seems to match Steagall's insofar as the telephone conversation is concerned. He had gone to El Centro and was calling Steagall about something. He says: "We were discussing several other matters and [Steagall] said—he had mentioned that Mr. Walby is here again looking for employment and I believe that I told him that—to tell him that we don't have anything right now and just if he have an offer with another production, just go ahead and take it."

The drop load was eventually carried out by one of the drivers already on staff. No new hires were made until November 9, 3 days after Steagall had advised Walby that he should look for work elsewhere. That individual was Randy Edwards. He was hired to replace his brother Danny who suddenly transferred to the special effects department. Randy Edwards was known by both Tancharoen and Whelpley from previous employment. On that same day, Respondent hired Chuck Henson. He had rented his water truck to Respondent earlier, and also owned a trailer that had been hauling live greenery for the outdoor sets. Because of that connection Tancharoen offered him a direct hire job. After that, on November 13, Respondent hired Doug Shetlar (no relation to Business Agent Shetler; names are spelled differently) to pick up some juvenile extras and their parents at the Phoenix airport and transport them to El Centro. This was a decision made by Tancharoen from El Centro.²² Then, on November 16, Tancharoen, because Steagall knew him, hired John Schramm, an El Centro resident to perform some construction driving there. Three days later, Steagall recommended John Schramm's brother Ron. Steagall could not recall what type of driving Ron Schramm did. All were on Local 104's movie list. No further hires were made until mid-December.

Steagall says that Walby was not considered for any of these hires. The obvious reason is that he had been told to look elsewhere on November 6. In addition, around about November 10, the production had moved to El Centro and Walby was nowhere around. In fact, he had taken back his business card with the pager number. Respondent could not have reached him if it had wanted to.

III. ANALYSIS

The General Counsel has several hurdles to clear in order to sustain his multifaceted complaint. The first is whether Walby was ever offered employment on the film. Connected to that question is, if he had been offered a job, whether it had been withdrawn. Finally there is the question of whether it was withdrawn for reasons prohibited by the Act.

²² The Shetlar hire appears to have been somewhat of an emergency. The producer did not notify Tancharoen of the need until very late. Shetlar was hired on very short notice at 5 p.m. that day by telephone. He had to find a passenger van, rent it and meet the plane with the juveniles and their parents. Tancharoen says he believes he accepted him based on the recommendation of Lisa Swain. If so, that is the only hire based on a recommendation from someone outside the transportation department.

I have carefully studied the contentions made in both briefs. I find, after doing so, that both counsel are guilty to some extent of conflating the issues, particularly as it concerns Local 104 and its movie list. That entity is not a respondent and to some extent the General Counsel may reasonably be accused of seeking to establish facts in this case which might be used against that labor organization through the use of offensive collateral estoppel principles. The General Counsel may not actually be doing so, but I must mention this issue so that readers of the record are not confused by some of the contentions. It is certainly a reasonable concern, for part of the factual matrix which the General Counsel seeks to use is one in which Local 104 has supposedly created an atmosphere in which film producers feel obligated to hire only Local 104 members. Or, perhaps, even bigger than that, an atmosphere created by entertainment unions generally, one which obligates film makers to hire only entertainment union members, or their non-Hollywood stand-ins, such as Local 104 or other IATSE locals.

The problem with that argument, found throughout the General Counsel's brief, is that it assumes, without proof, that Local 104 (or in consolidated Cases 28-CA-15649, 28-CB-5077, and 28-CB-5112, the Arizona IATSE Locals) has that kind of power. The assumption manifests itself in the brief by the assertion that Respondent is under some sort of compulsion to hire only Local 104 members, because it deems itself either obligated to do so by contract or by industry practice. Moreover, the General Counsel even sets forth a second assumption throughout its brief, that Respondent offered Walby a job on October 30.

Neither of those assumptions is really supported in the record. As will become clear, based not only on credibility finding, but also on business practice probabilities, I find that the evidence fails to support that Walby was ever offered a job by the "Three Kings" transportation department, much less that it withdrew such an offer. In addition, I find the General Counsel is off the mark with regard to having demonstrated that an atmosphere exists which obligates Respondent to prefer Local 104 members over any other Teamster member or over anyone else, for that matter.

No offer of employment was extended

Walby's credibility is subject to severe doubt. I have observed above that he is not to be trusted with respect to presenting facts in an objective manner. But there is more. There are places in the record where he seems to be more interested in the texts of his NLRB affidavit and his supplemental statement than he is in his oral presentation. Those statements seem to have become his recollection, not his own memory. His 17-page typewritten NLRB affidavit took several days to prepare. Yet it did not satisfy him. He describes how the 18-page supplemental statement came to be prepared: "It was prepared after the affidavit in Dubois, Wyoming between the dates of the 1st of December to the 14th of December in front of witnesses at the Absorka Western Designs business that's located two miles east of the town of Dubois because they were friends of mine and they had a word processor which I don't have. So I hitchhiked over to Dubois and used their word processor to better articulate my position on this case, sir." Oddly, he did not promptly submit it to the Regional Office investigators, but held it until shortly before the hearing.

I have quoted Walby here and extensively elsewhere. The purpose of these quotations, aside from the literal answers to the posed questions, was to allow Walby's nuances to become clear. In nearly all of the quotes, and in much of his testimony not quoted, an element of buttressing, exaggeration, or re-emphasis can be found. Yet when it came to describing the words which Tancharoen used to offer him a job, Walby is either silent, vague or conclusory. He never actually quotes Tancharoen using such words.

Indeed, Walby is more than simply an exaggerator. He is able to create detail, sometimes befogging detail, to support his claim of mistreatment. A principal example is his description of what Steagall supposedly said to him on November 6. At one point he says Steagall said the decision had been made not to hire him because his presence might cause disharmony with the Local 104 members who were on the set. He adds that Steagall told him he had spoken to Tancharoen on the point and had convinced Tancharoen not to hire him. Then, he asserts that Steagall at the same moment told him that maybe there was an office job which he might be able to perform, suggesting that Steagall really wanted to hire him, but that Steagall (who Walby says needed Tancharoen's approval) quickly changed his mind about that as well. Frankly, Steagall did not impress me as being so disorganized in his thought processes. Walby, on the other hand, simply jumped into every nook and cranny he could think of.

In contrast, both Tancharoen and Steagall made what appeared to me honest efforts to describe what happened as best they could remember. Tancharoen's candor was particularly impressive. He readily admitted that he believed he was obligated by contract to use Local 104's hiring list and that is why he did so.²³ By the time he testified he had come to believe that it might be an admission against the interest of Respondent, but did so anyway. He even did it knowing that there was a possible risk to future hiring by Warner Bros. connected production companies. (In fact, however, it turned out not to be an admission of any wrongdoing because the General Counsel's assessment of the list as being illegal is incorrect.)

Walby's evidence regarding the offer(s) of a job are mainly conclusions. On October 30, for example, he says that after he introduced himself to Tancharoen, apparently in the parking lot, Tancharoen replied that Courtney had been "raving" about Walby. I have already expressed my doubt about the validity of that remark, but whatever Tancharoen said, Walby says he immediately asked if Tancharoen would be needing some drivers for the show. Walby says he asked when, and then asked "when would you be able to use me?" to which Tancharoen said "next

week." This was followed up by a discussion about Walby's attempts to be placed on Local 104's list.

Contrary to Walby's belief, this conversation did not amount to a job offer. It is merely an inquiry by Walby followed by Tancharoen's answer, which while encouraging, was still indefinite. He did not tell Walby to fill out a job application form or fill out the tax or immigration forms, nor did he discuss the nature of the work. Walby had asked about drivers, but there is a myriad of driving jobs on films and he does not say Tancharoen told him what type of driving he had in mind. No reporting date, time, or place was mentioned. In fact Tancharoen did not even have Walby's resumé with him at that moment. This entire conversation was entirely too informal and incomplete for an offer of employment to have been made.

Walby seems to have recognized that, for even though he insists that the offer was made, he nonetheless says he needed to follow it up on November 3. Not waiting that long, he claims to have had another conversation with Tancharoen the next day, October 31. Tancharoen denies it. In this next conversation, Walby describes the first conversation as involving a job offer in El Centro, something he left out of his earlier description of the October 30 conversation. Moreover it meant that Walby would have to travel to El Centro for the work.

Assuming, for the moment that Tancharoen on October 30 had mentioned El Centro to Walby, why was there no mention of the nature of the work under either of Walby's versions? "Driving" is a vague concept in the circumstances.

Once again, however, Walby's testimony about what was said on October 31 falls short of an offer. He says he went back to inquire when he might be going to California because he thought he would drive his motorhome over and wait for the job. He concedes Tancharoen gave him a "maybe" or "probable" date, November 11. The vagueness of such an answer only emphasizes the tentative nature of the transaction. Even under Walby's own words it is not yet an offer of employment. It is only a statement of possibility.

It should also be observed that neither of Tancharoen's two assistants, Steagall and Whelpley, was engaged in this matter. Whelpley was not present at all, while Walby says Steagall simply introduced him to Tancharoen. He does not say that he heard Steagall actually recommend him to Tancharoen for hire. He only says that Steagall told him he would do so. Steagall, of course denies Walby's testimony in its entirety, but even Walby's claim that Steagall told him he would recommend him to Tancharoen is most unlikely. There is no credible evidence that Walby ever had the backing of Steagall (or Whelpley), the two upon whom Tancharoen relied for the hire of everyone else.

The evidence requires me to conclude that Walby's testimony that Tancharoen offered him a job on October 30 and 31 is only his own conclusion and that his conclusion is not supported by any evidence.

The result is the same with respect to the November 4 offer. Again, relying only on Walby for the moment, he says he appeared at the office early in the morning and presented himself in the transportation office doorway. He claims Tancharoen looked up, saw him and said, "We're getting close." He says Tancharoen then looked to Steagall and the two had a discussion which Walby could not recount. At the end of the discussion

²³ Had this not been a distant location, but a Hollywood hire, Tancharoen would have been contractually obligated to use either the studio seniority roster or Local 399's industry experience roster. The latter roster is similar to, but not the same as a hiring hall. A producer bound by that contract must hire from that roster, but it does not operate serially as in a traditional hiring hall. See the "Black Book," sec. VI, par. 62 (pp. 132-147). In Los Angeles Tancharoen no doubt hires from that roster on a regular basis when serving as a transportation coordinator. His mistaken belief is understandable. He believes such lists provide experienced, skilled and reliable employees. On its face, the Los Angeles roster is not based on union membership. Why would he think Local 104's list was?

Walby says "they agreed" that it would be November 7. Then he says they told him he would be driving a truck with office equipment to the El Centro location office. Oddly, he does not say he asked the next question, "what time do I report?" Instead at that point, extrapolating somewhat from Walby's somewhat fragmented testimony, a discussion began about the Local 104 list. Walby claims Steagall demanded it at one point in his testimony. At another Walby seems to say that he brought up the list himself. (In response to Tancharoen telling him he was to take the truck to El Centro, he replied, unhelpful to his cause: "I'm still having trouble getting on the union list.")

He says they then got into a discussion about the list and was told that he should speak to Local 104 to about it. For the only time in his job hunt, the loquacious Walby fell silent. He didn't give the expected response: "Shetler says I'm on the list. Let's call him and confirm it." This failing occurs, he says, despite the fact that on two earlier occasions Tancharoen had offered to help him get on the list.

This was the drop-load job. It was a one-way drive to El Centro. It meant that he would have no way to get back to Casa Grande. He would have to arrange his own way back, for Respondent was not going to provide return transportation to him. He insists, however, that this problem was not discussed with him on that day. (He says had been discussed earlier.) I find it hard to believe that his way back would not have come up during the November 4 conversation, if only to confirm that he had made appropriate arrangements.

Frankly, I have great trouble accepting Walby's testimony here. I don't reject it totally, because Tancharoen gives some testimony which is partially consistent.²⁴ In fact, the closest thing to an offer of employment was described by Tancharoen, not Walby. Yet, taken as a whole, I am not confident any actual offer of employment was made. If Walby's testimony leaves the matter in a state of uncertainty, Tancharoen's makes that doubtfulness certain. No job offer can be found here.

Finally, On November 6, Walby says Steagall told him that his hiring situation had changed, they weren't going to hire him after all, giving two reasons. The first was that they believed Walby's presence, since he was not a member of Local 104, would cause "disharmony on the set." The second was because they had determined that they didn't need any more drivers, and the drop load could be handled by existing staff.

The "disharmony" remark, if credited, would constitute an illegal preference. However, it presents itself in a way which does not allow for it to be credited. The job which Walby was supposedly going to perform was a one-time drop load. He was going to pick it up in the office area in Casa Grande and deliver it to the office area in El Centro. One day's work at most. So far as has been shown, he was to be the only driver. In that context, with whom would he be interacting? With whom would he have the opportunity to cause disharmony? If he was working alone, how could that be a concern? If he was being hired for a one-

time job which never even went on the set, how could he be disruptive of it? Steagall, of course, denies that he ever said such a thing.

Here Steagall's denial makes much more sense. In fact Steagall's testimony in general makes much more sense. Tancharoen's does, too. Tancharoen credibly testified that he would hire someone from the list. If Local 104 put a person on the list that was enough for him. With that in mind, why would he care if Walby was a member of another Local? Being on the list was enough. Moreover, if Walby did come off the list, how would that cause disharmony? He would have the same Local 104 imprimatur that other people on the list would also have had.

If Tancharoen had wanted to hire Walby he would have called Shetler to see if Walby had been added to the list as Walby claimed. He didn't do so, and the reason he never did was because he had never offered Walby a job. He didn't really have one to offer. The drop-load job was only a possibility, one which he would more naturally assign to a current employee if scheduling permitted. Why hire a new person if you already have enough people?

Moreover, there is a remarkable absence of expected hiring procedures which employers are obligated to follow, or usually follow, upon offering employment. There is no evidence that Walby was told to fill out any application form, provide a W-4 form, fill out an I-9 form or was offered a film industry employment contract known as a "deal memo." This notable absence is perfectly consistent with Tancharoen's and Steagall's testimony that they never offered him employment. At least some of those steps would have been taken had they offered him a job. None were. Moreover, the subject of what wage he was to receive would also have been touched upon, even if only to say it was union scale. In fact, the Hollywood Teamsters contract specifically requires that fringe benefit payments be made in cash to local hires, so that subject would have needed some more specific discussion. There is no evidence that such a conversation occurred with Walby. That is a void of significant proportion.

I suppose it could be said that Tancharoen and Steagall took advantage of Walby's hanging around in the sense that they spoke of possibilities at various times, thereby keeping Walby on the string until November 6. Yet, to say that an offer of employment had been extended to him would be saying too much. Keeping him on the string would be the expected thing to do if they were hiring from Local 104's list and Walby had told them he was on it and they ran into scheduling difficulties. They wouldn't have had to go far to find a qualified employee.

In addition, aside from Walby's testimony, there is no evidence whatsoever of improper favoritism toward Local 104. Respondent was obligated under its contract with the Hollywood Teamsters to utilize the assistance of the Local Union where the production was occurring. The governing language is found in section V, paragraph 30 of the contract (p. 117). It says only, "In hiring personnel at the [distant] location, the Producer will use its best efforts to notify the business agent for the Local Union involved at least 72 hours in advance and will consult with said business agent regarding the selection of qualified local hires provided that the producer will make the final decision."

This paragraph certainly does not create a contractual obligation of favoritism. In the final analysis it allows the producer to

²⁴ Tancharoen: "I believe I says (sic) [said], it would probably be a day just to do the drop load, a day or two at the most." "I said, 'If you're interested, it might be that but you have to do a drop load and get transportation back to Arizona.'" "It was a possibility. It wasn't a major—I mean, like an offer."

hire whomever he wants. All he has to do is consult with the business agent before making his decision. Local 104 has made the consultation process quite easy by creating the hiring list. If one is hired from that list the consultation obligation is satisfied. But hiring can clearly be done without using the list, once the consultation has occurred and the producer concludes he wishes to hire someone else. All it does is provide the Local Union with the opportunity to give the producer names of persons that the Local believes are qualified.

Moreover, Walby's testimony about membership favoritism is most odd. He had, for reasons of his brotherhood with Local 104, chosen to pay that Local's hiring hall fees. He then describes a conversation with Steagall regarding dues payments in which Steagall allegedly tells him, in explaining that Respondent doesn't have to hire from Local 104's list, that all one needs to do to be hired in Arizona is to show a dues receipt, supposedly waving his in front of Walby. That testimony amounts to a garble. On the one hand, it is Walby's admission that his presence or absence on the list was immaterial to Respondent and on the other it suggests that one had to be a paid up union member in order to be hired. Moreover, by the time of this conversation (Nov. 4), he was on the list (though an updated copy had yet to be forwarded). Either way, he had met the requirements, as he perceived them, of both Local 104's and Respondent's approval. He was on the list and had paid the preliminary fees he thought he should. None of this, of course has anything to do with how Respondent perceived him. It is certainly not evidence of illegal evidence of favoritism. It is only Walby whirling around in a world of his own making.

Once again, Steagall's testimony is the one which makes sense: "[He] came by the office and it all was about this list and he was asking me again if he had been on the list. He said he was on the list at that point, that he'd, I think paid his dues or had paid the union some money to get on the list and that he's fine to be hired." Moreover, Steagall clearly denied that he ever told Walby that all he needed to get hired was a copy of his dues receipt. I find the denial to be credible.

Credible evidence of Respondent's favoritism toward Local 104 members is not present in this record.

At this point, one really needs to go no further. Clearly the basic elements of this type of violation are the existence of a job opening, together with an application for the job by a prospective employee, the employer's offer to hire, followed by a refusal to hire. But the Act requires more. "The refusal must be grounded in a reason which is prohibited by the statute, discrimination resulting in . . . the encouragement or discouragement union membership, i.e., a desire to compel applicants to be members of a specific union." That element is the obverse of union animus, the component which is always essential in the ordinary refusal to hire case. See *Big E's Foodland*, 242 NLRB 963, 968 (1979). The foregoing analysis demonstrates that two of the required elements are missing. First, no job offer was made or withdrawn and even if that had occurred, second, there is no evidence of an illegal motive for having done so. Even the existence of a job for Walby is open to question. It is true that there was a task which needed to be done, the drop load for El Centro. But it is quite clear that Tancharoen's preference was for an employee already on staff to do that. He just didn't know if he had anybody avail-

able. When he determined that he did have someone, the job evaporated, even though the task remained. Accordingly, the complaint must fall.

However, something does need to be said about the General Counsel's theory that Local 104's movie list is illegal and Respondent's reliance on it poisoned its hiring practices. This theory is based on a presumption arising out of the fact that to the General Counsel all of the people on the list seem to be Local 104 members. Before exploring that presumption some record facts need iteration.

The first and most important observation to be made about the list is that nowhere is there any obligation for a movie producer to use it. It is entirely optional. It is not even a hiring hall in the recognized use of that terminology. Local 104 does not refer anyone from the list. It was obviously created by Local 104 as a convenience. It is convenient for itself, because it allows the Hollywood Teamsters contract's requirement that the business agent to be consulted prior to hires be met without any great effort on the business agent's part. It is convenient to the producer for the same reason and because he is relatively assured that the persons on the list are qualified. The producer is usually from outside the area and has limited knowledge about potential employees. At the very least the Local Union can vouch for those on the list. And, it is convenient to Local 104's constituency. Their names are placed on a list which is made available to employers in circumstances where the Local vouches for them as experienced potential employees.

The one thing which the General Counsel abhors about the list is that it appears to contain the names of only union members. First, I do not believe the record actually establishes that to be the case. No union official testified and the only testimony about the list came from people without first-hand knowledge. Therefore the competency of those witnesses to know that fact is nonexistent. Second, even though Walby says he had difficulty being placed on the list, eventually his name appeared, on October 30. He was not a member of Local 104, but was a fellow Teamsters. That placement occurred a week before he filed any NLRB charges against Local 104. Therefore, we know at the very least, that traveling Teamsters are able to get on the list, thereby undermining any contention that the list is limited to Local 104 members.²⁵ But assuming it is true, the practice is still not unlawful.

²⁵ Walby claims he first sought to be placed on the list as early as mid-October. He did not arrive in Phoenix until October 21. It was at that point, he says, that he began to get a runaround from either business agent Shetler or the Tucson agent. Even so, he was actually placed on the list only 9 days later. He says he paid Local 104 a hiring hall fee, but it is not clear when he did so. If it took Walby some time to make the payment, that may well explain the delay. It is also possible that the delay is attributable to something else, maybe a need to contact Local 2 or the International to verify Walby's credentials. The only way to find out is to have someone from Local 104 testify about it. That didn't occur, and since the General Counsel is the one making the contention, it was his burden to call such a witness. Since he did not, I cannot make findings about the delay, even if there was one. Certainly I am unable to take the next step and conclude that the delay was somehow pernicious on Local 104's part or the following step, that Local 104 somehow poisoned Walby's chances of getting hired by Respondent.

Beyond the record is some law contrary to the General Counsel's position. The statute itself only prohibits discrimination which tends to encourage or discourage union membership. The language of Section 8(a)(3) reads in pertinent part: "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage union membership in any labor organization."

That language was discussed in detail with respect to its application to hiring halls by the Supreme Court 39 years ago. *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961). It said at 674 ff.:

There being no express ban of hiring halls in any provisions of the Act, those who add one, whether it be the Board or the courts, engage in a legislative act. The Act deals with discrimination either by the employers or unions that encourages or discourages union membership. [Fn. Omitted.] As respects §8(a)(3) we said in *Radio Officers, etc., v. National Labor Relations Board*, 347 U.S. 17, 42–43, 74 S.Ct. 323, 337, 98 L.Ed. 455:

"The language of §8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed."

It is the "true purpose" or "real motive" in hiring or firing that constitutes the test. *Id.*, 347 U.S. 43, 74 S.Ct. 337. Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference. *Id.*, 347 U.S. 45, 74 S.Ct. 338. And see *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372. The existence of discrimination may at times be inferred by the Board, for "it is permissible to draw on experience in factual inquiries." *Radio Officers v. NLRB*, supra, 347 U.S. 49, 74 S.Ct. 340.

But surely discrimination cannot be inferred from the face of the instrument when the instrument specifically provides that there will be no discrimination against "casual employees" because of the presence or absence of union membership.²⁶ The only complaint in the case was by Slater, a union member, who sought to circumvent the hiring-hall agreement. When an employer and the union enforce the agreement against union members, we cannot say without more that either indulges in the kind of discrimination to which the Act is addressed.

It may be that the very existence of the hiring hall encourages union membership. We may assume that it does. The very existence of the union has the same influence. When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are

drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustments of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages membership whenever it does its job well. But, as we said in *Radio Officers v. National Labor Relations Board*, supra, the only encouragement or discouragement of union membership banned by the Act is that which is "accomplished by discrimination." 347 U.S. at page 43, 74 S.Ct. at page 337.

If, as the Supreme Court held here, exclusive hiring halls are not discriminatory on their face, how can a nonexclusive list be discriminatory? The simple answer is that it cannot. Thus, even if Local 104's list was limited to union members, an employer would not violate Section 8(a)(3). Nonexclusive hiring halls are not unlawful even if operated solely for the benefit of the union's members. *Penzel Construction Co.*, 185 NLRB 544 (1970). If it is nonexclusive, the union has no power over the employee and there is nothing which requires the employer to use it. *Teamsters Local 460 (Superior Asphalt Co.)*, 300 NLRB 441 (1990). This has been the law since *Ohio Valley District Council of Carpenters*, 131 NLRB 1130 (1961).

Even if the list was actually limited to Local 104 members and it was part of an exclusive hiring system, it is not the law that a union violates Section 8(b)(2) or an employer Section 8(a)(3) simply based on its use. It might be a very suspicious program but suspicion does not even raise a presumption of illegality, much less proof. In a case where the union had the sole authority to determine which employees were to be selected for layoff, Trial Examiner Stanley Ohlbaum made a comment with the Board's approval which resonates here: "While, to be sure, suspicion may exist as to the real motivations and reasons which underlie the layoffs in question, suspicion breeds and feeds upon itself, and it may not form the core for inference nor serve as substitute for the substantial credible proof that the law requires." *Laborers Local 282 (Elzinga-Lakin)*, 226 NLRB 958, 959 (1976). Absent proof that the union's choices for layoff were discriminatory even when directed at nonmembers, the practice was approved even though it may have encouraged union membership, though not in a prohibited way. See also *John L. Klug Corp.*, 245 NLRB 977 (1979), a case where an employer voluntarily chose (with the union's consent) to utilize an exclusive union hiring hall. Again, proof of discriminatory motive was required but found lacking; presumption of illegal motive was not enough. Also, *C. Solari & Sons*, 264 NLRB 282 (1982). ("Thus, Respondent's decision, after the merger, to utilize Local 971's hiring hall cannot be found to be violative of the Act, *absent evidence of discrimination*." "[Dickson] would have been referred had he simply registered with the hiring hall. There is no evidence that Dickson would have been required to join Local 971.") (Emphasis added.) Clearly presumptions of illegality may not be used. Actual proof is required.

This raises the question of what the Board found in its decision against Local 104 on April 29, 1998, a decision entitled *Teamsters Local 104 (Blue Rodeo)*, 325 NLRB No. 121 (not reported in Board volumes). At first blush, the case seems to pose some

²⁶ The Hollywood Teamsters' contract contains just such a clause. sec. VI. par. 57, p. 129.

problems here. Among other things the Board found that the wrangler/driver list was part of an exclusive referral system as operated beginning March 28, 1996. In that case Local 104 chose to withdraw its answer to the complaint on December 16, 1997, and permitted a summary judgment (default judgment) to be entered by the Board. That occurred, as noted, in April 1998. I first observe that the conduct under scrutiny here occurred 6 months after the entry of that order (and about a year after the complaint issued).

Certainly Local 104 had ample time to render the list nonexclusive before the transaction under scrutiny here. Second, it was operating as an agent for the Hollywood Teamsters whose contract by its terms establishes a nonexclusive means of hiring drivers at distant locations. Finally, no matter what Local 104 did or didn't do with respect to allowing persons on the list, there is no reason to conclude that Respondent did anything unlawful when it chose to use the list as its source of Arizona drivers. It was looking for geographically local hires;²⁷ it was looking for employees with movie experience; and it was looking for reliable drivers. To Respondent the list appeared to provide such individuals. In that circumstance the only encouragement of union membership was in the nature described by the Supreme Court in *Teamsters Local 357* as permissible. Local 104 was simply doing its job well. It was certainly not poisoning the hiring process.

That discussion actually brings the entire Walby matter full circle. Assuming arguendo that Walby was telling the truth about everything, except for his contention that Steagall had told him that they had decided not to hire him because his presence could bring disharmony, and Respondent had offered a job to Walby (not on the list) but later changed its mind in order to take someone else from the list, there would still be no violation. Choosing someone whose workmanship has been vouched for in a nonexclusive hiring context simply does not violate the Act, even if one of the effects is to hire a union member over a nonmember. Membership preference, according to the Court, would not have been a motivating factor behind the decision and therefore any other purpose qualifies as a purpose which does not encourage or discourage union membership in a prohibited manner. Walby was not from Arizona, his workmanship and reliability were unknown and he had no one to vouch for him. The others did. Those factors are not prohibited by the Act. The 8(a)(3) portion of the complaint should be dismissed.

The 8(a)(1) allegations

Remaining for consideration are five allegations, involving three transactions, asserting that Respondent independently violated Section 8(a)(1) of the Act. They are, by date: (a) a claim that on October 28 production department supervisor Mary Courtney coercively interrogated Walby about his union memberships in the course of a job interview; (b) on November 4, Tancharoen first interrogated Walby regarding his union memberships and then impliedly threatened Walby by telling him he would not be hired unless he was a member of Local 104; that during the same conversation Steagall promised to hire employees who were members of Local 104; and (c) that on November

6, Steagall threatened Walby with reprisal by telling him he could not hire him and that he wanted to avoid disharmony on the job because Walby was not a member of Local 104.

The only allegations which require much further thought are the interrogation allegations against Courtney and Tancharoen, particularly since Courtney did not testify. The others have essentially been dealt with in the discussion concerning the refusal to hire Walby. With respect to that, I have found that the incidents did not occur as described by Walby. Those findings were based on my assessment of Walby's lack of credibility and the connected 8(a)(1) allegations should all be dismissed.

The interrogations

Insofar as the interrogations are concerned, the allegations again depend on Walby's credibility. I do not accept Walby's version, but beyond that, am compelled to ask why they are even in the complaint. In the very first telephone call Walby made to Tancharoen in September, Walby told Tancharoen he was a Teamster from Wyoming, a member of Local 2 of Butte, Montana. Tancharoen never forgot that and Walby repeated his status to anyone who spoke to him. In fact, his first meeting with Steagall typifies his general approach. He thought volunteering that he was a Teamster would assist him in getting hired:

Q. [Y]ou thought being a union member would help you get work, right?

A. . . . Right, that's what I am.

He also told Lisa Swain he was a Teamster from Butte, adding that he was an IATSE member. It was certainly no concern to her. She found him a day's work and her response confirmed that his theory worked. He must have thought: If you tell them you are a union member, they are more likely to hire you.

By the time he got to Courtney, not only was the word out, but it had become his byword. He confidently testified that Courtney did not know his union affiliations when she interviewed him on October 28, but I have previously rejected his conclusion. Even if he had not volunteered it to her, which I think he did, for it had become a habit with him, it would have been an easy way for her to put him at ease during the interview—open a subject she already knew (from Swain at the very least) he was eager to talk about.

The general rule is that to constitute a violation of the Act, an interrogation must be coercive and have the object or result of causing an employee to abandon rights guaranteed under Section 7 of the Act. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). This was far from coercive. In fact Walby actually invited people to ask about his Montana Teamsters film experience. He believed he was with fellow union brothers and sisters and such revelations would put him in a positive light. He was right. Courtney offered him a job driving Clooney; he turned it down. He can hardly complain if a prospective employer did what he asked her to do.

Moreover, if the employee's union views or sentiments are well known, such as might be displayed by an ardent union supporter, the Board has held questions about that view are generally lawful, for they will not dissuade the individual from such views. *Rossmore House*, 269 NLRB 1176 (1984). Here, while the surrounding circumstances do include the fact that Courtney was

²⁷ Geographical preferences are lawful. See *Electrical Workers Local 8 (Romanoff Electric)*, 221 NLRB 1131 (1975). (With respect to overtime.)

conducting a job interview, they also include the fact that the atmosphere was gentle and that Walby knew from the outset Courtney was trying to find him work, no doubt in theatrical crafts at which he was skilled. The nature of his IATSE membership was the most efficient path to her goal, as that labor organization is subdivided along craft lines. In fact he was on the IATSE's list of theatrical mechanics, one of the skills/crafts he was pursuing.

A. (WALBY) She asked me what my union affiliation was and then I told her.

Q. (MR. DRAPKIN): And did she ask you that like she was trying to find work for you?

A. Oh, yes

He went into that interview believing, correctly, that Courtney was going to try to find him a job. He essentially had invited her to ask. She certainly took no steps to force him to abandon any Section 7 right. She only wanted more precisely to find out what his demonstrated skills were. On a factual basis, there is simply no warrant to find the questions to have been coercive.

Likewise the allegation of interrogation by Tancharoen falls as well. First, there was no reason for Tancharoen to ask about Walby's union membership. To repeat, Walby had told him what it was from the outset. He had recited it to every one else as well. Therefore, even if the question had been asked, the allegation founders under a *Rossmore House* analysis. Second, I have discredited Walby's version anyway. I have found above that his version of the November 4 conversation cannot be accepted.

The General Counsel's allegations of unlawful interrogations never held water from the outset. Quite simply, neither Tancharoen nor Courtney was seeking to interfere with, restrain, or coerce him in any way into revealing his union affiliations and he knew it. His affiliations were worn as a proud badge and he wanted to talk about them. A common test to be applied in determining the lawfulness of interrogation is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act. Under that test, the General Counsel's evidence falls short.

The General Counsel's citation of cases holding that such questions are inherently coercive²⁸ when asked during a pre-hire interview must take a back seat to the facts as they developed here. In this factual context, applying the Board's "inherently

destructive" analysis simply demonstrates how fragile "per se" logic can be. Applying it here would be to apply a rule which does not fit the facts. Its use would be wooden and without common sense. The General Counsel also wants an adverse inference drawn against Respondent because Courtney did not testify.²⁹ I find that to be unwarranted given Walby's own words.

The interrogation allegations have not been sustained by credible evidence nor does the putative evidence meet the Board's test for being coercive. Accordingly, they should be dismissed as well.

Based on the foregoing findings of fact and analysis, and the record as a whole, I issue the following

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Teamsters Union Local No. 104, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. The General Counsel has failed to prove by credible evidence that Respondent violated Section 8(a)(3) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁰

ORDER

The complaint is dismissed in its entirety.

Any outstanding motions which have not been ruled on are denied.

²⁹ The adverse inference issue became the subject of one of the motions to strike portions of the briefs. Respondent directed me to something which occurred in the prehearing telephone conference; the General Counsel wants to strike it so he can take advantage of the fact that the request was not repeated for the record. Suffice it to say that Walby's own words are sufficient to deal with the issue of credibility. Adverse inferences, while common, are often overcome by record evidence. That is the case here.

³⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁸ E.g., *Bendix-Westinghouse Automotive Air Brake Co.*, 161 NLRB 789, 791-792 (1966); *Service Master*, 267 NLRB 875 (1983); *United L-N Glass*, 297 NLRB 329 fn. 1 (1989); and *Adco Electric*, 307 NLRB 1113 (1992), among others.